

February 14. 1771.

UNTO THE RIGHT HONOURABLE,

The Lords of Council and Session,

19th July
1771
Sec

T H E

P E T I T I O N

O F

Sir ARCHIBALD DENHAM of West-
field, Baronet,

HUMBLY SHEWETH,

THAT Sir William Denham of Westfield, deceased, on 14th July 1711, settled his lands and estate of Westfield, in the form of a strict tailzie, containing the usual clauses, *de non alienando*, &c. upon Robert Baillie of Hardington, and his heirs-male; and failing them, upon the petitioner, his nephew, and his heirs-male.

Upon the 6th August thereafter, Sir William executed a settlement of his moveable estate, and a great variety of debts due to him by bonds, both heritable and personal, in favour of the same substitutes who were appointed to succeed to the estate of Westfield. The plain and declared intention of this second settlement was, that the debts and moveables thereby conveyed should be instantly applied towards

A

payment

payment of any debts that might affect the tailzied estate of Westshield; and that the same might be transmitted free and unburdened to the several heirs of tailzie.

Sir William Denham having died the 1st January 1712, without issue, the succession, by virtue of this tailzie, opened to the said Robert Baillie, who made up his titles by a general service, no infeftment having ever passed upon the tailzie; but omitted to ingross in his service the resolute and irritant clauses.

This neglect was made the foundation of a declarator of irritancy, at the instance of the petitioner, who was the next substitute; and after a good deal of litigation, a judgement was pronounced by this court, on 24th February 1726, finding the irritancy to be incurred.

During the time that Robert Baillie had been in possession, which was about thirteen or fourteen years, he had uplifted the whole of the debts and moveable estate left by Sir William Denham, excepting a debt secured upon the estate of Hardington, which he had no opportunity of uplifting, as the ranking of the creditors upon that estate was not brought to a conclusion till many years after. This the petitioner had occasion to set forth to the court in 1722, in an application which he then made for having the tailzie of Westshield recorded.

The petitioner having entered into possession in consequence of the above judgement, an action was brought against him, at the instance of one of Robert Baillie's creditors; and, notwithstanding the defences which were pleaded for the petitioner, upon the footing of the tailzie, the court, in November 1731, found the estate of Westshield affectable for payment of Robert Baillie's (Sir Robert Denham's) debts. But upon an appeal to the House of Peers, this judgement was reversed, and Sir Robert's debts were found not to be good against the estate of Westshield.

In

In the year 1731, Alexander and Robert Denhams, sons of Sir Robert, entered an appeal to the House of Lords, against the judgement declaring the irritancy against their father; and the judgement having been reversed, Sir Robert Denham, son of the former Sir Robert, succeeded to and possessed the estate of Westshield till his death, which happened in 1756; at which time the succession again opened to the petitioner, by virtue of Sir William's deed of tailzie.

It appears, that Sir Robert Denham, (Robert Baillie), on the 3d May 1712, granted a bond of the following tenor.

" Sir Robert Denham of Westshield Dr to John Weir,

" June 11. 1711, To the funeral-charges of
 " Captain Walter Denham, and his brother
 " Sir William Denham of Westshield, Ja-
 " nuary 2. 1712, all together amounting to
 " the sum of - - - L. 1348 4 2

" I Sir Robert Denham of Westshield, by these presents,
 " grant me to be justly resting and owing to John Weir
 " merchant in Edinburgh, all and haill the sum of L. 1348
 " Scots money, for necessaries furnished to the funerals of
 " my deceased uncles, Sir William Denham of Westshield,
 " and Captain Walter Denham his brother-german; which
 " sum I oblige myself, my heirs, executors, and intromitters
 " with my goods and gear whatsoever, thankfully to con-
 " tent and pay to the said John Weir, his heirs, executors,
 " or assignees, betwixt and the term of Lammas next to come,
 " with the sum of L. 400 of expences of plea, in case of
 " failzie; together also with the due and ordinary annual-
 " rent of the said principal sum from the term of Whitsunday
 " next to come, till the term of payment above written, and
 " ay and while the said sum is unpaid."

An

An action was raised upon this bond in the year 1749, by Elifabeth and Jean Weirs, daughters of John Weir, and James Donaldson merchant in Drumseuch, husband to Elifabeth, for his interest, against Sir Robert Baillie *alias* Denham, and his tutors and curators, as representing the granter of the bond upon the passive titles. As the character in which the defender is called in that action appears to the petitioner material in the present cause, he will beg leave to state it to your Lordships in the words of the summons itself; which are as follow. " And albeit the said pursuers, and the said James Donaldson for his interest, have oft and divers times desired " and required Sir Robert Baillie *alias* Denham, now of West-shield, and his tutors and curators, if they any have, for " their interest, as son and heir of the said deceased Sir Robert Denham, and intromitter with his charter-chest, writs, " and evidents, of his land and estate, rents, mails and duties thereof; at least as successor to him *titulo lucrativo post contractum debitum*; at least he and his said tutors and curators, if he any has, for their interest, as being lawfully " charged to enter heir in general to his said father within " forty days, conform to act of parliament; at least as vicious and universal intromitters with his said father his " moveable debts, goods, gear, and effects, and otherwise " representing him on one or other of the passive titles known " in law; to make payment," &c.

This action was called on 2d November 1750, before the then Lord Justice-Clerk Ordinary; upon which occasion the following minute and interlocutor appears. " Williamson " repeated his libel, and writs produced, and insisted against " the defender, as representing the deceased Sir Robert Denham, his father, upon the passive titles libelled, and craved decret. Lockhart, for the defender, denies the passive titles. Williamson alledged, The defender is charged " to enter heir. Lockhart answered, That he is content to " renounce *qualificatè*; and craved a competent time to give " in

“ in a renunciation. — Finds the libel relevant, and the
 “ passive title of lawfully charged to enter heir, instructed by
 “ the letters of general charge, and execution thereof produ-
 “ ced; but, for eliding thereof, sustains the defence of a va-
 “ lid renunciation; and assigns to the defender’s procurator
 “ the first day of December next for producing the same.”

No farther proceedings ensued on that process, which seems to have been altogether deserted. But in the year 1769, a summons was raised against the petitioner, and William Lockhart residenter in Craignethan. This summons proceeds at the instance of Jean Weir, daughter to John Weir. It narrates, that furnishings had been made for the funerals of Sir William Denham in the year 1712, and of Captain Walter Denham in the year 1711, for the amount of which furnishings Sir Robert Denham had granted bond; and it concludes against the defenders, as representing Sir William Denham on the passive titles.

The defences returned in this process are in the following words: “ *1mo*, That there is no title in the pursuer’s person
 “ to the debt; *2do*, The defender Sir Archibald does not re-
 “ present Sir Robert Denham, the granter of the bond; and,
 “ *3tio*, The debt is long ago prescribed.”

The cause came before the Lord Kennet Ordinary in the course of the rolls; who, after hearing parties at the bar, was pleased, on 16th February 1770, to pronounce the following interlocutor. “ Having considered what is above set
 “ forth, finds the defenders are not liable for the funeral-
 “ charges of Captain Walter Denham; but finds them liable
 “ for the expence of Sir William Denham’s the tailzier, be-
 “ ing L. 674 : 2 : 1 Scots; and decerns against them for pay-
 “ ment thereof.”

Mutual representations were given in against this interlocutor; answers also were given in on the part of the pursuers to the representation for the defender, and, on 6th December 1770, the Lord Ordinary pronounced the following interlocutor. “ The Lord Ordinary having considered the mutual re-

B

“ presentations

“ presentations for the parties, and answers for the pursuer
 “ to the defender’s representation ; and in respect that the de-
 “ fender has failed to give in answers to the pursuer’s repre-
 “ sentation, holds the facts therein stated as true ; and de-
 “ cerns for the sum contained in the account and bond libel-
 “ led, being L. 1348 : 4 : 2 Scots money, and interest thereof
 “ since the 5th July 1769, the date of the citation in this pro-
 “ cess, and in time coming, till payment.”

The petitioner preferred a representation against this interlocutor, which being appointed to be answered, the following interlocutor was pronounced on 17th January last. “ The
 “ Lord Ordinary having again considered this representation,
 “ with the answers thereto, refuses the desire of the said re-
 “ presentation, and adheres to the former interlocutor.” And a representation being presented against this interlocutor, the Lord Ordinary, on the 2d instant, refused the desire thereof, and adhered to his former interlocutor.

These interlocutors the petitioner humbly submits to the review of your Lordships.

It is an admitted point, That the petitioner is not the representative of Sir Robert Denham, the granter of the bond libelled on, in any other shape than as heir of tailzie under Sir William Denham’s deed of entail. No separate estate descended to him from Sir Robert ; nor has he ever done any deed that could subject him to a passive title.

So standing matters, the petitioner must, in the *first* place, submit to your Lordships consideration, whether the claim of the pursuer is not altogether prescribed, in so far as it can be made effectual against him ; or, in other words, whether the negative prescription has not run against any action competent against the representatives of Sir William Denham, in consequence of this claim being supposed a debt payable out of his estate.

For your Lordships will observe, that though this had been a debt originally exigible out of the estate of Sir William Denham,

ham, yet the *jus crediti* on that estate was derelinqished, and the obligation altogether innovated by the bond taken from Sir Robert Denham in the year 1712; whereby, instead of an open account, upon which an action lay against the estate, and particularly against the executry of Sir William Denham, the pursuer's predecessor betook himself to a personal obligation against Sir Robert Denham, his heirs and representatives whatsoever. And this dereliction and innovation will appear in a more conspicuous point of view, when it is considered, that this very debt, if justly due out of the estate of Sir William Denham, was a preferable debt upon his executry; which executry was of very considerable value, and sufficient to pay a great deal more than all the debts that Sir William owed. The pursuer's predecessor, therefore, in taking this bond from Sir Robert, did what was equivalent to uplifting the sum out of the executry, and lending it afterwards to Sir Robert upon his personal bond.

That this was really the intent and meaning of parties, appears farther from the process brought in the year 1749, when the then Sir Robert Denham is pursued for payment of this very bond, and is pursued, not as the representative of Sir William Denham, or upon the footing of this being a debt exigible out of his entailed estate, which Sir Robert was then in possession of, but upon the footing of his being the representative of Sir Robert Denham the granter of the bond, by incurring passive titles to him: Accordingly, when the cause is called before the Lord Ordinary, the defence pleaded is, That Sir Robert did not represent his father upon the passive titles, and offered to produce a renunciation. The Lord Ordinary sustains the defence, and allows him to give in his renunciation. It is remarkable, that neither in the summons, nor in the minute, is there the least mention made of Sir Robert Denham being the representative of Sir William, and, on that account, liable on the passive titles; neither does it appear, that the pursuer represented against the interlocutor pronounced, sustaining the defence; so that it stands a *res judicata*,

cata, finally determined by that interlocutor, that it was a sufficient defence against the debt pursued for, that Sir Robert Denham did not represent his father.

If that defence was good to Sir Robert, it must likewise be good to the petitioner; and if action were now competent against him, he apprehends he would be intitled to plead the decision in that process, as a precedent in this one; and indeed as a precedent *inter easdem personas de eadem re*; for Sir Robert was an heir of entail, so is the petitioner; and the present pursuer is one of the very identical persons who appeared as a pursuer in that action, and upon the same titles upon which that action was brought. It seems unnecessary, however, to insist much on this point, as the petitioner apprehends action does not lie against him at all, prescription having run *quoad* him; for, from the period of Sir William's death in the 1712, to the time that this action was brought, no less than fifty-seven years have elapsed without any act of interruption of any kind, as the process brought against Sir Robert Denham in the year 1749 cannot be looked upon in the light of an interruption, since it proceeded not against Sir Robert as an heir to Sir William, or in virtue of any claim supposed competent against Sir William's estate, but singly in virtue of the personal obligation by the first Sir Robert; so that if ever any claim existed against the estate of Sir William, all action upon that head is now cut off by the negative prescription.

Even supposing this action had been brought within the period of prescription against the petitioner, as representative of Sir William Denham, still a point would require to be discussed, meriting the attention of your Lordships, viz. How far the document produced by the pursuer as her ground of action, could serve as a document of debt against the representatives of Sir William Denham in his entailed estate.

Your Lordships have heard, that Sir Robert Denham, after the death of Sir William, entered not only into possession of

of his entailed estate, but also intromitted with his executry and moveables. This he did to a very great extent, viz. upwards of L. 2000 Sterling; and this moveable estate was sufficient to have paid off every shilling of debt that Sir William owed.

Supposing the heritable estate had descended in one way, and the moveable estate in another, there is no question but that the funeral-expences of Sir William was a preferable debt upon the moveable estate, and fell to be paid by the executor; insomuch that, if the heir had actually paid them, he would have been intitled to relief out of the executry funds.

Now let it be supposed, that this event had actually happened, that the executry had descended to a different person from the land-estate, and that the undertaker for the funerals, instead of confirming executor-creditor, or pursuing either heir or executor for the funeral-expences, had taken a bond from the executor, binding him, and his heirs and assignees, in a sum certain, declaring that sum to have been the funeral-expences of Sir William Denham, the petitioner apprehends it is clear, beyond a possibility of doubt, that this bond could never be made use of as a document of debt against the heir of the land-estate, who did not represent the executor, and had no connection with him whatever. The person who had accepted of such a bond, instead of following out the legal course against the heir and executor, would be held to have innovated the debt, to have relinquished his claim against the estate of the defunct, and to have betaken himself to the sole security of the person who was executor, and his representatives.

The case, in the apprehension of the petitioner, is not essentially different, where the same person succeeds as heir and executor, but takes the land-estate under a strict entail, and the executry in the usual manner. He cannot, by any act or deed of his, burden the entailed estate, and he is bound

to pay the debts of the defunct out of the moveable estate as far as it will go. When, therefore, instead of paying off a debt which fell to be paid out of the moveable estate, he grants bond, upon a narrative that the sum contained in that bond is a debt due by the defunct, such a bond will never militate against the successors in the entailed estate, or prove against them, that the debt was actually due by the entailer; on the contrary, the creditor in such bond will be presumed, *novatione debiti*, to have relinquished all claim against the entailed estate, and the heirs of entail, and to have betaken himself to the personal security of the first institute, and his representatives whatsoever.

Many instances of cases similar to this have occurred in practice; not indeed in the matter of entails, but in other points, where the similarity of principles produces the same *ratio decidendi*.

Thus in the case of a person on deathbed, who by law cannot do a deed to the prejudice of his heir, in the same way that an heir of entail cannot do a deed to the prejudice of his heir under the entail, it has been found, " That a bastard cannot prejudge the King of a sum resting to him, by declaring on his deathbed, that upon his conscience that sum pertained not to him, but to another who borrowed his name to the bond; Hadington, 10th December 1623, *Craw contra* . — A father upon deathbed calls his son, and declares, that the right of such an apprising, standing in his person, is but in trust, and takes his promise to denude it to the true party; accordingly the boy afterwards grants an obligation to that effect, but being minor, he was induced to revoke it. The Lords, from a principle of conscience, allowed a trial, by witnesses, or otherwise, if the father was heard at any time in his health to acknowledge this right to be only a trust; but did not sustain his declarator *in lecto*; Fountainhall, 22d November 1687, *Crawfurd contra Bell*. — A person upon deathbed having
" executed

“ executed a declaration of trust with relation to an estate in
 “ his person, the declaration was found not probative against
 “ the heir, unless supported by other adminicles; Dirleton,
 “ Gosford *contra* June; Stair, 26th November 1674, Paton
 “ *contra* Stirling.”

In like manner a bankrupt, who, by the act 1621, is disabled from granting any deeds in favour of conjunct and confident persons, unless for onerous causes, cannot, by inserting an onerous cause in the narrative of the deed, make that deed probative in favour of the person to whom it was granted. On this point a variety of decisions are collected in the Dictionary, *voce* Proof, which to recite would take up too much of your Lordships time, and serve only to swell this paper unnecessarily, as the general point seems to be established beyond a possibility of doubt.

Upon the same principles, in former times, when escheats were the consequence of remaining unrelaxed at the horn for twelvemonth, “ A discharge, bearing payment of a bond
 “ granted to a brother by a rebel, denounced, and in prison for
 “ debt, was found not to prove its onerous cause against a
 “ donator of escheat; and that the payment behoved to be
 “ otherwise instructed; Stair, 15th January 1679, Cranston
 “ *contra* Kyle. — A bond granted after horning, bearing
 “ to be for the price of wines, was not found probative of
 “ its onerous cause against the donatar of escheat, though
 “ it did not appear that the creditor was a conjunct and confident person; but he was allowed to instruct the onerous
 “ cause by the rebel’s count-book, and books of entry, he
 “ being a merchant: and the Lords refused to sustain a proof
 “ simply by witnesses, without such adminicles in writ; Dirleton, 20th December 1676, Veitch *contra* Pallat.”

In the same way, after inhibition used against any person, the narrative of a deed granted by him, will not prove, that a debt to which that deed is made to relate, existed before the date of the inhibition; but if the debt is not instructed

aliunde

aliunde, the deed will be cut down by the inhibition. Now, the case of a person under inhibition bears a very close resemblance to the case of an heir of entail; for by the ordinary clauses in an entail, obliging the several heirs not to dispose nor contract debt to the prejudice of those to succeed them, the remoter substitutes are all constituted creditors to the heir in possession *quoad* that obligation; and the registration of the tailzie in terms of the act 1685, is considered as an interpellation to all the lieges, and has precisely the same effect with an inhibition executed upon this obligation, at the instance of the several substitutes. An heir in possession, therefore, by virtue of a tailzie, is in the same situation *quoad* the remoter substitutes, with a debtor under inhibition *quoad* a creditor-inhibitor; and his deeds ought to be as little either obligatory upon, or probative against, these substitutes, as the deeds of a person inhibited have been determined to be, with regard to the creditor at whose instance the inhibition had been used.

It deserves to be remarked, that, in this case, no account of funeral-expences appears; and a good deal of affectation has been used, in making out the bond by Sir Robert Denham. To give it the better appearance, it begins in a very formal manner, "Sir Robert Denham of Westfield, Dr to John Weir." But then what follows? Is it a particular account of furnishings? far from it: It is one lump sum, said to be for the funeral-expences of two different persons, but which would have been just as applicable to any other thing that had been prefixed to it, and would have been every whit as intelligible, if the words "to fundries," had been used instead of the words that here occur: and it is rendered still more singular, by there not being a distinction made between the amount of the funeral-expences of Sir William Denham, and of those of his brother Captain Walter.

Had an action been brought immediately after the death of these gentlemen, against Sir Robert Denham, upon such a
scrap

scrap of paper as this, it is humbly apprehended it would by no means have been sustained; such slump bills affording no room for inquiry, whether furnishings had really been made or not, which can easily be done, when the particulars of the furnishings are stated. Neither indeed can such bill be capable of proof, which is a most essential thing in every ground of action. It is essentially necessary, that the particulars of an account of furnishings pursued on, be set forth, in order that it may be proved, if required; for a shop-account does not prove its furnishings it contains. These, if denied, must be otherwise proved; and, after three years, though the furnishings are proved, they are not held to be due, unless they are shown to be so, by writ or oath of party. If writ is the mean of proof resorted to, it must bear a reference to the furnishings; for it is not sufficient, because a man writes that he owes a shop-account, that therefore a shop-account may be brought in to any extent, without particulars being mentioned. After such writing, a man has still a liberty to say, You must point me out the particulars of your furnishings; and he may object to such particulars as truly never were furnished.

The writing therefore on which the present action proceeds, is not even of the nature of a written attestation of a shop-account, which would avail to preserve an action against the triennial prescription; because there is really here no account at all. In short, it is clearly a personal bond of Sir Robert Denham's, which can militate only against him and his representatives, to the credit of whom the receiver of that bond betook himself; but which can never create a debt against Sir William Denham's heir of entail.

May it therefore please your Lordships, to alter the interlocutors of the Lord Ordinary; and assoilzie the petitioner simpliciter from this action.

According to justice, &c.

ANDREW CROSBIE.